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No. 09-403

In The Supreme Court of the United States

DARRYL JONES; MICHAEL JONES; ANTHONY PASLEY; STEPHEN W. GIBSON,
Petitioners,

v.

CITY OF FRANKLIN, TENNESSEE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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Questions Presented for Review

1. **Whether the Standard of Construction Applied to Petitioners' EEOC charges by the Sixth Circuit Court of Appeals conflicted with the standard applied by other Circuits?**

   No.

2. **Whether the Trial Court and the Court of Appeals properly stated the rule of law?**

   Yes.

3. **Whether the Trial Court and the Court of Appeals misapplied the properly stated rule of law to the facts of this case?**

   No.

4. **Whether the Trial Court and the Court of Appeals improperly failed to apply the single-filing rule to allow Petitioners' to utilized EEOC charges previously filed by other City employees?**

   No.

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Opinions of the Courts

The Sixth Circuit Court of Appeals filed an unreported opinion in this matter on February 5, 2009, under the docket number 08-5180. A copy of the opinion is attached as an appendix to the Petition for Writ of Certiorari. The District Court for the Middle District of Tennessee filed its memorandum and opinion on January 23, 2008, under the docket numbers 3:06-0807; 3:06-0808; 3:06-0809; and 3:06-0810. Its opinion was also unreported and is attached as part of the appendix to the Petition for Writ of Certiorari.

Basis for Jurisdiction

Petitioners filed their original claims pursuant to 42 U.S.C. § 2000e, 42 U.S.C. § 1981 and the Tennessee Human Rights Act. Therefore, the District Court had jurisdiction pursuant to 28 U.S.C. § 1331. An appeal was timely filed with the Sixth Circuit Court of Appeals. Following the issuance of its opinion, Petitioners timely filed a Motion for Rehearing En Banc, which was denied. Petitioners then timely filed their Petition for Writ of Certiorari.

Statement of the Case

This is a civil action brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, 42 U.S.C. § 1981, and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 *et seq.* Petitioners filed their complaints on August 21, 2006, alleging that they were subjected to a racially hostile work environment and were subjected to discrimination in promotional processes, as well as

other discrete acts. See, R. 1, Complaint as to D. Jones, 3:06-cv-0807, Apx. pg. 0016; R. 1, Complaint as to M. Jones, 3:06-cv-0808, Apx. pg. 0024; R. 1, Complaint as to Pasley, 3:06-cv-0809, Apx. pg. 0032; R. 1, Complaint as to Gibson, 3:06-cv-0810, Apx. pg. 0039. The cases were consolidated under 3:06-cv-0807. See, R. 11, Order, Apx. pg. 0071.

On January 23, 2008, the District Court entered its Memorandum and Opinion granting summary judgment to Respondent on all claims by all Petitioners. See, R. 136, Memorandum and Opinion, Apx. pg. 1421. As to all Petitioners, the Court held that it lacked jurisdiction under Title VII to consider their hostile environment claims, because these claims exceeded the scope of all of their EEOC charges. See, R. 136, Memorandum and Opinion, Apx. pg. 1424.

Petitioner D. Jones was hired as a firefighter for the City of Franklin in 1987. See, R. 1, Complaint as to D. Jones, 3:06-cv-0807, ¶ 10, Apx. pg. 0017. He filed his first EEOC charge on January 20, 2005. The charge listed the first and last dates that the discrimination occurred as July 1, 2004. He did not check the continuing violation box. Petitioner's charge stated:

> I. In July 2004 I received unfair evaluation rating that affects the percentage of raise I am to receive. I have been employed with the Franklin City Fire Department since November 16, 1987. Currently I am an engineer with the department. It employs over 100 individuals.

II. Lt. Mike Jones' evaluation of me was changed by Deputy Chief Todd Horton to a lower rating. I was never provided an explanation for the lower rating.

III. I believe I have been discriminated against due to my race, Black, in violation of Title VII of the Civil Rights Act of 1964, as amended.

See, R. 79-1, Notice of Filing of Exhibits, Apx. Pg. 0646.

Petitioner D. Jones filed his second EEOC charge on March 30, 2005. He listed the dates of discrimination as occurring between January 20, 2005, and March 3, 2005. Again, he did not check the continuing violation box. See, R. 51-1, Depo. of D. Jones, Apx. Pg. 0266-67; R. 71, D. Jones' Response to Statement of Undisputed Material Facts, §§ 2, 3, Apx. Pg. 0601. Petitioner's second charge read:

> I have been employed with the City of Franklin Fire Department since November 16, 1987. I am presently incumbent in the position of engineer. The City Manager gave false information to the Williamson County Review Appeal Newspaper.
>
> No reason has been given for this action.
> I believe that I have been discriminated against in retaliation for having filed a previous charge in violation of Title VII of the Civil Rights Act of 1964, as amended.

See, R. 26, Memorandum in Support of Motion for Summary Judgment as to D. Jones, Apx. Pg. 0092.

Petitioner M. Jones was hired as a firefighter by the City of Franklin in 1984. See, R. 1; Complaint as to M. Jones, 3:06-cv-0808, ¶ 10, Apx. Pg. 0025. Petitioner filed his first EEOC charge on February 4, 2005. See, R. 47-1, Dep. Of M. Jones, Apx. Pg. 0195. The charge listed the first and last date that the discrimination occurred as July 1, 2004. See, R. 47-1, Dep. Of M. Jones, Apx. Pg. 0195. He did not check the continuing violation box. Petitioner's charge stated:

I. From July 1, 2004 until the present, I have been denied my annual evaluation. The City of Franklin Fire Department is a city government entity and has at least fifteen employees. My date of hire is June 26, 1984.

II. Our fiscal year begins and ends on July 1. To my knowledge, I am the only person in my department who has not received their annual evaluation on, or before, July 1, 2004. I have asked the evaluator, an Assistant Chief at the time, why I have not received one. He has not given me an answer and only laughs at me. I had given a high rating to a black subordinate and the same Assistant Chief overruled that rating and lowered the black employee's score.

III. I believe I have been discriminated against due to my race, black, in violation of Title VII of the Civil Rights Act of 1964, as amended.

See, R. 47-3, Depo. Of M. Jones, Ex. 1, Apx. Pg. 0217. Petitioner determined the dates of discrimination himself. See, R. 47-1, Dep. Of M. Jones, Apx. Pg. 0196.

Petitioner filed his second EEOC charge on March 30, 2005. See, R. 47-4, Depo. Of M. Jones, Ex. 2, Apx. Pg. 0218. He listed the dates of discrimination as occurring between February 4, 2005, and March 3, 2005. See, R. 47-4, Depo. Of M. Jones, Ex. 2, Apx. Pg. 0218. Again, he did not check the continuing violation box. See, R. 47-4, Depo. Of M. Jones, Ex. 2, Apx. Pg. 0218. Petitioner's second charge read:

> I have been employed with the City of Franklin Fire Department since 1984. The City Manager gave false information to the Williamson County Review Appeal Newspaper.
> The City Manager has given no reason for this action.
>
> I believe that I have been discriminated against in retaliation for having filed previous charges in violation of Title VII of the Civil Rights Act of 1964, as amended.

See, R. 47-4, Depo. Of M. Jones, Ex. 2, Apx. Pg. 0218.

Petitioner filed a third EEOC charge on January 18, 2006. See, R. 47-5, Depo. Of M. Jones, Ex. 4, Apx. Pg. 0219. This charge stated:

> I am being denied promotion because of my race, Black, and my age, 47. I have been employed with the Fire Department since June 26,1984. The city employs over 15.

> The testing for promotion was not a certified test, and the tests were graded at the time of the test. All four Black employees failed the test, but most of the White employees passed the test. The chief made a statement that the promotion would be put on hold because all four Black employees had failed the test. The chief further stated that in order to qualify for the promotion, a college degree was required.
>
> Just recently a White administrative captain was given a shift captain position without any required testing. He had been hired as a training officer and has never been in fire suppression. This is one of the positions we tested for, and it will not be available for filling from the ranks as before.
>
> I believe I have been discriminated against because of my race, Black, in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> I further believe I have been discriminated against because of my age, 47, in violation of the Age Discrimination in Employment Act of 1967.

See, R. 47-5, Depo. Of M. Jones, Ex. 4, Apx. Pg. 0219. Petitioner determined the dates of discrimination himself. See, R. 47-2, Depo. Of M. Jones, Apx. Pg. 0206.

Petitioner Gibson was hired by the City of Franklin as a firefighter in 1987. See, R. 1; Complaint as to Plaintiff Gibson; 3:06-cv-0810; ¶ 10, Apx. Pg. 0040. Petitioner filed an EEOC charge on June 28, 2005.

See, R. 45-4, Depo. Of Gibson, Ex. 1, Apx. Pg. 0182. His charge stated:

I. I have been employed by the Franklin Fire Department since June 22, 1987. I believe because of my race/Black, I have been subjected to a discriminatory selection process that has an adverse impact regarding promotional opportunities for blacks as a class. Less qualified whites are systematically promoted over qualified blacks when the Franklin Fire Department continues to change the promotional requirements/job descriptions to advance lesser qualified whites to the ranks of Captain and above.

II. Recently, a white city official made the racial comment that as long as he had anything to do with promotions, a rug head would never be in charge of a department of the Franklin Fire Department.

III. I believe I have been discriminated against due to my race/Black in violation of Title VII of the Civil Rights Act of 1964, as amended.

IV. The Franklin Fire Department discriminates against blacks as a class in promotional opportunities in violation of Title VII of the Civil Rights Act of 1964, as amended.

See, R. 45-4, Depo. Of Gibson, Ex. 1, Apx. Pg. 0182.

Petitioner Pasley was hired as a firefighter by the City of Franklin in 1985. See, R. 1, Complaint as to Plaintiff Pasley; 3:06-cv-0809, ¶ 10, Apx. Pg. 0033. Petitioner filed his first EEOC charge on June 27, 2005. See, R. 49-2, Depo. Of Pasley, Ex. 1, Apx. Pg. 0249. The charge listed the first date of discrimination as June 27, 2003, and the last date is listed as June 27, 2005. See, R. 49-2, Depo. Of Pasley, Ex. 1, Apx. Pg. 0249. He did not check the continuing violation box. See, R 49-2, Depo. Of Pasley, Ex. 1, Apx. Pg. 0249. Petitioner's charge states:

> I have been with the department since August 12, 1985. From the past few years until now, I have observed disparate treatment of blacks in hiring and promotion.
>
> No reason has been given for this treatment. I believe that I have been discriminated against because of my race (black), in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> Blacks as a class have been treated this way.

See, R. 49-2, Depo. Of Pasley, Ex. 1, Apx. Pg. 0249. Petitioner did not file any other charges with the EEOC. See, R. 49-1, Depo. Of Pasley, Apx. Pg. 0245.

Argument

1. Sixth Circuit's Standard Does Not Conflict with Sister Circuits

Virtually every Circuit Court in the United States applies the same standard to determine whether an EEOC charge satisfies the notice requirement under

29 C.F.R. § 1601.12(b). Before a plaintiff can bring suit under Title VII, he must exhaust his administrative remedies by filing a charge with the EEOC, which serves the dual purpose of putting the employer on notice of the plaintiff's claims and allowing the EEOC an opportunity to settle the dispute. Cheek v. Western & So. Life Ins. Co., 31 F.3d 497, 500 (7th Cir. 1994). Therefore, the judicial complaint must be limited to the issues presented in the plaintiff's EEOC charge.

To determine whether or not to allow a claim that has not been specifically addressed in the plaintiff's charge, Circuit Courts look to the scope of the EEOC's actual investigation or claims that could reasonably be expected to grow out of the charge of discrimination, even if not investigated by the EEOC. Ang v. Procter & Gamble Co., 932 F.2d 540, 545 (6th Cir. 1991)(citing, EEOC v. Bailey Co., Inc., 563 F.2d 439, 446 (6th Cir. 1977), *cert. denied,* 435 U.S. 915, 98 S. Ct. 1468, 55 L.Ed.2d 506 (1978)); Fantini v. Salem State College, 557 F.3d 22, 26-27 (1st Cir. 2009); Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 177 (2d Cir. 2005); Hicks v. ABT Assoc., Inc., 572 F.2d 960, 966 (3rd Cir. 1978); Smith v. First Union Nat'l Bank, 202 F.3d 234, 247 (4th Cir. 2000); Danner v. Phillips Petroleum Co., 447 F.2d 159, 162 (5th Cir. 1971), *cert. denied*, 429 U.S. 986 (1976); Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 167 (7th Cir. 1976) (en banc); Lyons v. England, 307 F.3d 1092, 1104 (9th Cir. 2002); Martin v. Nannie & the Newborns, Inc., 3 F.3d 1410, 1416, n. 7 (10th Cir. 1993); Chanda v. Engelhard/ICC, 234 F.3d 1219, 1225 (11th Cir. 2000).

The standard used by the Sixth Circuit Court of Appeals does not conflict with any of its sister Circuits.

These Circuit Courts apply the same or very similar rule of law for this issue. These Circuits have been successfully applying this standard for decades with this Court's implicit approval. Respectfully, this Court's resources could be more effectively utilized to determine a less settled issue.

2. Sixth Circuit Properly Stated the Rule of Law

In this case, the Court of Appeals correctly stated the "reasonably expected to grow out of" standard. It presented the issue on appeal as, "whether the present four plaintiffs exhausted their administrative remedies so that the district court could hear their hostile-work-environment claims." The Court then cited Strouss v. Mich. Dept. of Corrections, 250 F.3d 336, 342 (6th Cir. 2001), for the rule that "district courts may not hear Title VII claims 'unless the claimant explicitly files the claim in an EEOC charge or the claim can be reasonably expected to grow out of the EEOC charge.'" See, Petitioner for Writ of Certiorari, p. 9a. As evidenced by the citations above, this is the same standard used by most Circuit Courts. Therefore, the Sixth Circuit properly stated the rule of law, and this Court's supervisory powers are not warranted for this matter.

The Trial Court likewise stated the proper rule of law. The Court acknowledged in its opinion that charges filed with the EEOC by non-lawyers must be construed liberally and broadly. The Court then correctly stated the rule of law that a court cannot hear a matter unless the plaintiff explicitly files the claim in a charge or the claim can be reasonably expected to grow out of the EEOC charge. See, 20a-21a. The Trial Court, like the Court of Appeals, cited

Strouss v. Mich. Dept. of Corrections, 250 F.3d 336, 342 (6th Cir. 2001).

Neither the Court of Appeals nor the Trial Court erred in stating the standard to determine whether Petitioners put the EEOC and employer on notice of their claims of a hostile work environment. The rule applied by these Courts was clearly stated in both opinions and properly cited from Sixth Circuit precedent. Petitioners have not cited to any other specific standard which they allege the Courts should have used rather than the "reasonably expected to grow out of" standard. Without a split in the Circuits, or a misstated rule of law, this Court should deny the Petition for Writ of Certiorari.

3. The Court of Appeals and Trial Court Properly Applied the Rule of Law

The crux of Petitioners' argument appears to be the misapplication of a properly stated rule of law. Petitioners summarize the Court of Appeals' holding by stating, "The Court, however, held that because the report of racial slurs was encompassed in a charge about discreet [sic] employment actions and disparate treatment against 'blacks' as a class, an investigation of a hostile work environment would not reasonably be expected to grow out of the EEOC's investigation. The Courts deviated from established precedent and applied a strict construction standard." See, Petitioners' Petition for Writ of Certiorari, p. 5.

While Petitioners assert a deviation from established precedent, they have cited no case law that establishes any precedent other than the use of the "reasonably expected to grow out of" standard. The

Sixth Circuit Court of Appeals applied the same standard that has been applied almost universally by its sister Circuits. Therefore, it can only be concluded that Petitioners' appeal is based on erroneous factual findings or a misapplication of a properly stated rule of law. This basis is rarely an error for which a petition for writ of certiorari should be granted, and Petitioners have offered no reasons as to why their Petition is extraordinary. See, Sup. Ct. R. 10. Since the essence of Petitioners' argument is the misapplication of the law to these particular facts, further appellate review would only benefit Petitioners at most. A ruling contrary to that of the Court of Appeals would most likely be limited to these specific facts. Respectfully, this is not a sufficient basis for the United States Supreme Court to grant certiorari.

However, even if Petitioners had asserted an appropriate basis for this Court to accept the matter, both the Trial Court and Court of Appeals correctly applied the rule of law to the facts of this case. The Trial Court diligently reviewed the record in this matter and allowed Petitioners ample leave to submit all documents necessary to prove their claim. The Trial Court even allowed Petitioners to supplement the record with the entire file from the EEOC for all seven charges filed by Petitioners. See, R. 95, Plaintiffs' Omnibus Supplement Response to Defendant's Motions for Summary Judgment, Apx. Pg. 1123.

The Trial Court's Memorandum and Opinion demonstrates the detail in which the Court considered Petitioners' EEOC charges. For example, in regard to Petitioner D. Jones, the Trial Court reviewed two charges, two intake questionnaires and a sheet entitled "Racial Discrimination," which was provided

to the EEOC by Petitioner. See, Trial Court's Memorandum and Opinion, p. 21a-23a. The Court considered all the allegations made in all of these documents by Petitioner and found that they all related to hiring and promotions of African Americans. The Court further found that the only slur or harassing comment mentioned by Petitioner was specifically linked to a promotional process. Therefore, the Court held, the EEOC would only have been prompted to investigate a claim of racial discrimination and not a hostile work environment. Id.

The Court conducted a detailed inquiry similar to the one discussed above into each of Petitioners' charges and all documents provided by them to support their claims. In each instance, the Court held that no mention was made of a hostile work environment or any facts that would lead the EEOC to investigate whether or not a hostile work environment existed. Id., at p. 24-31. Therefore, the Court held that Petitioners did not exhaust their administrative remedies in regard to their claims of a hostile work environment. Id.

The Court of Appeals also considered this issue thoroughly and thoughtfully. It considered the EEOC files for Petitioners' charges, the Trial Court's opinion and oral arguments presented by counsel. The Sixth Circuit agreed with the Trial Court that Petitioners only complained about discrete acts. The Court further found that only one instance of a racist comment was addressed by Petitioners, and it was directly tied to a particular promotional process. This, the Court held, was not enough to lead the EEOC to investigate a claim of harassment, which is separate in

kind from a claim of discrimination. See, Court of Appeals' Opinion, p. 10a-11a.

Petitioners allege that "[t]he Trial Court and Court of Appeals required the Petitioners use the words 'hostile environment' and list every instance of racial hostilities to put the employer and EEOC on notice of the nature of their claims." See, Petitioners' Petition for Writ of Certiorari, p. 4. It should be noted that neither the Trial Court nor the Court of Appeals required this of Petitioners, and neither opinion can possibly be construed to require such. It is disingenuous at best for Petitioners to attempt to stretch the Courts' opinions to these extreme parameters.

Both Courts found that Petitioners did not allege even one single instance of harassment or any facts that would have lead the EEOC to investigate a hostile work environment. As the Trial Court noted, if the harassment had been so severe and pervasive for years in the Franklin Fire Department, as Petitioners allege in their judicial complaints, then they had ample opportunity to address these claims in any of the seven charges filed by them. See, Trial Court's Memorandum and Opinion, p. 21a. Both Courts sought at least a *single* instance of harassment, not *every* instance of harassment. Petitioners failed to reach even this modest standard.

4. It was proper for the Court of Appeals and Trial Court not to consider Petitioners' single-filing rule argument.

The Trial Court and Court of Appeals did not err by not addressing Petitioners' argument that the single-

filing rule saves their hostile work environment claims. The single-filing rule is simply inapplicable in this case. None of the Petitioners provided a sufficient factual basis for a hostile environment claim; therefore, there is no claim to piggyback.[1] While the policy behind this doctrine is that it would be wasteful for several plaintiffs to file the same charge, it is imperative that at least one of the plaintiffs file such a charge. Out of four Petitioners and seven charges, not one addressed a hostile working environment. Therefore, there is not a sufficient charge to piggyback. The Trial Court and Court of Appeals did not err by not allowing this doctrine to save Petitioners' claims of a hostile working environment.

Conclusion

For the reasons stated above, Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

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[1] In their brief to the Court of Appeals and their Petition for Writ of Certiorari, Petitioners cited the cases of Baltimore v. City of Franklin; 3:06-cv-0578; and Cotton v. City of Franklin; 3:06-cv-0580; to support their single-filing argument. However, the EEOC charges filed by Baltimore and Cotton are not in the record in this case. Therefore, it would have been inappropriate for the Trial Court or the Court of Appeals to consider the charges.

Respectfully Submitted,

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